#156-11 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu11499-08_1.html)

WAYNE SPELLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured principal at Cambridge Park School and director of Special Programs in respondent's district – appealed the May 2008 vote of the Board to withhold his employment and adjustment increments for the 2008-2009 school year, based on the district superintendant's determination that petitioner had not properly overseen the administration of the district's Terra Nova testing during the 2006-2007 school year. Petitioner contended that the Board failed to follow its own policy for withholding increments, and therefore the increments should be restored. The Board contended that the withholding of the increments was not arbitrary, capricious or unreasonable.

The ALJ found, *inter alia*, that: an individual contesting a salary increment withholding has the burden of proof to demonstrate that the Board's decision was arbitrary, capricious, and without a reasonable substantive basis; the primary factual dispute is which of two Board policies – Policy 2132 or Policy 4117.51 – apply in the instant matter; Policy 2132, which sets forth a minimal process for evaluation of tenured administrators, applies here; the applicable policy procedurally requires only the preparation of a summary-review document by June 30 if an increment withholding is being recommended, and this requirement was met; petitioner received two written notices concerning the Board's intention to discuss his performance, and was offered and took the opportunity to offer a written rebuttal in the performance evaluation; and petitioner had an opportunity to persuade the Board to restore the increments through the grievance process hearing. The ALJ concluded that petitioner had not demonstrated that the Board acted arbitrarily or that he was substantially prejudiced. Accordingly, the ALJ affirmed the Board's action to withhold petitioner's increments.

Upon independent review and consideration, the Commissioner concurred with the ALJ that Policy 2132 applied to the petitioner and that respondent satisfied the requirements set forth therein. Additionally, the Commissioner found that several due process safeguards articulated in Policy 4117.51 were provided to petitioner, notwithstanding that they appeared on their face to be intended for the protection of teachers. Accordingly, respondent's action in withholding petitioner's salary increments for the 2008-2009 school year was upheld, and the petition dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 21, 2011

OAL DKT. NO. EDU 11499-08
AGENCY DKT. NO. 249-8/08

WAYNE SPELLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
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Petitioner's challenge to respondent's decision not to award him salary increments for the 2008-2009 school year comes to the Commissioner by way of cross applications for summary decision. After review of the record, Initial Decision of the Office of Administrative Law (OAL) and parties' exceptions, the Commissioner is constrained to adopt the Initial Decision as the final decision in this case. The facts have been set forth in detail in the Initial Decision and will be referenced herein as needed.

It is undisputed that respondent's decision not to award petitioner increments was in consequence of mistakes or oversights he had made in the administration of Terra Nova testing[1] during the 2006-2007 school year. Supervising the administration of the tests was petitioner's responsibility, and it is undisputed that the flawed administration of same had a significant educational impact on the students in the district. Petitioner's sole claim before the

[1] A series of standardized achievement tests used nationally and designed to assess K-12 student achievement in reading, language arts, mathematics, science, social studies, vocabulary, spelling, and other areas.

Commissioner is that respondent's imposition of the increment withholdings was arbitrary, capricious and unreasonable, in that respondent allegedly failed to follow the procedures set forth in its written policies.

As a threshold matter, competing policies are presented by the parties as the standard by which to measure whether respondent's actions conformed to its own rules. Respondent maintains that Board Policy No. 2132 – "Evaluation of Administrative Personnel" – was and is the apposite policy. No evidence has been presented by petitioner showing that Policy 2132 cannot apply.

The relevant provisions of Policy 2132, Joint Exhibit J - 1a–4a, instruct that the chief school administrator, *i.e.,* the superintendent of schools, shall annually present to the respondent board evaluation summaries for all district administrators, along with any responses by the administrators and any "recommendations for change of position, retention, dismissal, or salary increments as may be appropriate and require Board approval." (Joint Exhibit J-2a) Such summary documents are to be prepared by the chief school administrator in conference with the individual administrators and their supervisors by August 31 unless the chief school administrator decides to recommend an increment withholding, in which case the summary must be finalized by June 30. (Joint Exhibit J-4a)

The Commissioner notes that Policy 2132's language contemplates the possibility that an administrator's evaluation may lead to a recommendation for the withholding of increments. The only requirement articulated for that eventuality is that the evaluation summary and recommendation be presented to the board of education by June 30, as opposed to August 31. (Joint Exhibit J-1a-4a) No violation of Policy 2132 is at issue in this case.

Petitioner contends that respondent should have implemented the provisions of Board Policy 4117.51 – "Witholding an Increment." (Joint Exhibit J- 9a–11a). Policy 4117.51 is part of a series of policies pertaining to "Certified Personnel." The parties have stipulated that they could provide no one who could testify about the 'legislative' history of Policy 4117.51, and that there is no precedent in the district for the application of Policy 4117.51. Thus, it was necessary for the ALJ to consider the four corners of the policy itself. The Commissioner has done the same.

> Policy 4117.51 instructs, *inter alia,* that:
>
> As a general policy, the Board will ***not*** (emphasis in the original) withhold a salary increment on the basis of a single poor evaluation or a single incident except in flagrant cases. A staff member should generally be given a minimum of ninety (90) calendar days to correct deficiencies in teaching performance and prior notice concerning unacceptable, non-flagrant behavior, before an increment is withheld.
>
> The chief school administrator shall represent to the Board that the standards to which the employee has been held are not exceptional or unusual and apply to all employees in a similar classification.
>
> Prior to voting on a recommendation to withhold a salary increment, the Board shall offer the employee the right to a hearing before the Board or a committee thereof to oppose the proposed withholding . . . .
>
> To insure due process protection, procedures as outlined in the accompanying regulations will be utilized in connection with any withholding of increment action by this Board of Education.
>
> [Emphasis added.]
>
> (Joint Exhibit J-9a.)

The procedures set forth in Policy 4117.51 require an informal meeting within ten school days of whatever incident triggers the potential for withholding an increment. If the meeting does not resolve the problem, the administrator is required, within ten school days, to present the teacher with a written notice of:

> 1. The incident, deficiency or behavior complained of;
> 2. The corrective action which the administrator deems necessary;
> 3. In cases of deficiency in teaching performance, a warning that failure to correct the deficiency within ninety (90) calendar days may result in a recommendation for withholding of the employee's increment;
> 4. In cases of unacceptable, but non-flagrant behavior, a warning that repetition of such conduct may result in a recommendation for withholding the employee's increment.
>
> [Emphasis added.]
>
> (Joint Exhibit J-10a.)

The employee is required by the policy to acknowledge receipt of the warning by affixing initials to a copy of it, and has the right to respond in writing. If he or she fails to correct the deficiency in teaching performance within the ninety-day period or repeats the unacceptable behavior:

> the administrator may recommend to the chief school administrator that the employee's increment be withheld for the following academic year. Any such recommendation shall be in writing, giving the specific reasons for the recommendation and representing to the chief school administrator that the subject employee is being held to the same standards as all other employees under the administrator's supervision. A true copy of the administrator's written recommendation shall be transmitted on the same date to the employee and to the Matawan Regional Teachers Association. The affected employee shall have a period

> of ten (10) school days to submit to the chief school administrator's office a written response to the administrator's recommendation . . . .
>
> i[Emphasis added.]
>
> (Joint Exhibit J-10a-11a.)

The remainder of Policy 4117.51 states that if the administrator determines to recommend to the board that the increment be withheld, "the employee shall be furnished with a true copy of the chief school administrator's recommendation, the reasons therefore and a notice that he/she may have a hearing before the Board prior to its vote" on the recommendation. Upon a vote to withhold, the board is required within ten school days to give written notice of the action to the employee, together with the reasons therefor, and to provide notice of his/her right of appeal to the Commissioner of Education. The Matawan Regional Teachers Association also must receive a copy of the notice. (Joint Exhibit J-11a.) The foregoing notwithstanding, Policy 4117.51 states that where "flagrant conduct" is involved, all the articulated procedures – save those described in this paragraph – do not apply. (*Ibid.*)

The Commissioner is not persuaded that, between the two policies under scrutiny, Policy 4117.51 governs this controversy. First, in all references to the 90-day correction period it is <u>teaching</u> that is specifically identified as the category of performance that receives the protection of a probationary period before imposition of a penalty. Thus, even assuming, *arguendo,* that Policy 4117.51 applied to petitioner, respondent was not obliged to follow the Policy 4117.51 guidelines pertaining to correction periods.

Second, the procedures in Policy 4117.51 A and B – calling for a meeting after an employee's offending conduct and a second meeting if the offending conduct reoccurs – also expressly refer to teachers and teacher performance. (Joint Exhibit J-10a) Similarly, the

language of Policy 4117.51 D – which advises that uncorrected performance deficiencies may result in a recommendation for increment withholding – also specifically identifies teaching performance as the subject of the provision. (Joint Exhibit J–10a-11a) Moreover, Policy 4117.51 requires that a recommendation for increment withholdings be copied both "to the employee and to the Matawan Regional Teachers Association" (MRTA), and that notice of any affirmative vote by the board be sent to both the employee and the MRTA. (Joint Exhibit J–11a)

In sum, while Policy 4117.51 uses the word "employees" liberally, it is teaching performance and teachers that are identified in the specific provisions that describe the main procedures to be followed before and after a recommendation to withhold increments. Additionally, even if Policy 4117.51 did apply, its Section G instructs that "[s]teps A through D of [its] procedures need not be followed in the event of flagrant conduct." (Joint Exhibit J-11a) While flagrant conduct is not defined in the policy, the Commissioner would be hard-pressed to find that respondent was unreasonable in viewing as flagrant the deficient administration of an important state diagnostic test. In this regard, the Commissioner is mindful of the words of respondent's superintendent O'Malley who stated – in his letter to petitioner advising of the board's action – that the defective Terra Nova testing had a significant educational impact on the students in the district. *See,* Joint Exhibit J-32a.

The Commissioner also notes that respondent took several of the measures prescribed by Policy 4117.51 to ensure that petitioner was informed that the administration's concerns about his performance were significant enough to warrant presentation to the respondent board. As mentioned in the Initial Decision, petitioner received written notice as early as February 27, 2008 that his job performance would be discussed by respondent on

March 3, 2008 and that he could opt for a public discussion of same. (Joint Exhibit J-12a) Petitioner did not opt for a public discussion but was allowed to communicate his position to the board attorney for input during respondent's closed session on March 3rd. In the Initial Decision the Administrative Law Judge (ALJ) found that at this point petitioner knew that the focus of the concerns with his performance was the deficient administration of the Terra Nova testing. (Initial Decision at 4) Petitioner does not appear to dispute this.

On April 17, 2008 petitioner was sent another written notice that his job performance would be discussed in closed session at an April 23, 2008 board meeting. (Joint Exhibit J-13a) Further, it is undisputed that on May 16, 2008 petitioner met with his immediate supervisor to go over his annual evaluation, which evaluation memorialized his inadequate management of the Terra Nova testing. The record suggests that at that meeting the testing problems were discussed, and that petitioner was permitted to add a rebuttal to the evaluation document. (Joint Exhibit J-14a-18a)

Additionally, it is undisputed that before the May 19, 2008 board meeting, Superintendent O'Malley verbally advised petitioner that the board would be taking action on his recommendation to withhold increments from petitioner.[2] Thus, before the respondent board actually voted to withhold increments from petitioner, there had been multiple written and verbal notices to petitioner about the contemplated action and reasons therefore. Petitioner had been provided the opportunity to be heard – both by conveying his position to the board attorney at the March 3, 2008 board meeting and by attaching a rebuttal to his evaluation.

Consistent with procedure F of Policy 4117.51, on May 20, 2008, Superintendent O'Malley sent a letter to petitioner advising that the respondent Board had voted

[2] The parties agree that such a conversation took place, but do not agree how far in advance of the board meeting it occurred.

not to award him increments for the 2008-2009 school year. The letter provided the reasons for the action:

> …your inefficiency in properly supervising and implementing the Terra Nova testing for the District, in your position as Principal/Director of Special Programs. As you know, only a portion of the Terra Nova test was completed by the students, since your instructions to the staff on proctoring the examination [were] incomplete and inaccurate. Obviously, the failure of the District to receive meaningful Terra Nova testing results jeopardized the educational performance and evaluation of the District's students.
>
> (Joint Exhibit J-19a)

Statutory authority, case law and respondent's policies instruct that increments are not automatic and may not be granted where performance is lacking. *See, e.g., N.J.S.A.* 18A:29-14; *North Plainfield Education Ass'n v. Board of Education,* 96 *N.J.* 587, 593 (1984); Policy 4117.51 at 1. In contesting a salary increment withholding, it is the employee that has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super* 288, 294 (App. Div. 1960). In light of the foregoing discussion about the content of Policies 4117.51 and 2132, the Commissioner cannot conclude that respondent was arbitrary, capricious or unreasonable in determining that the latter policy, rather than the former, was the appropriate policy to follow in evaluating petitioner and assigning consequences to a less than satisfactory performance.

Thus, the Commissioner concurs with the ALJ that Policy 2132 applied to the petitioner and that respondent satisfied the requirements of same. The Commissioner further finds that several due process safeguards articulated in Policy 4117.51 were provided to petitioner, notwithstanding that they appeared on their face to be intended for the protection of teachers. Consequently, the Commissioner cannot conclude that respondent acted arbitrarily,

capriciously or unreasonably in deciding not to award increments to petitioner for the 2008-2009 school year.

Petitioner's motion for summary decision is accordingly denied and respondent's motion for summary decision is granted. The petition is dismissed and respondent's action to withhold increments from petitioner is upheld.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 21, 2011

Date of Mailing: April 21, 2011

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).